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No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

MARVIN HOWARD BOCKTING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the rule in *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), that the testimonial hearsay statements of an unavailable declarant are inadmissible absent a prior opportunity for cross-examination applies retroactively to cases on collateral review.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 7
Argument:
Crawford does not apply retroactively to cases on collateral review 10
A. *Crawford* announced a new rule 12
B. *Crawford* established a procedural rather than a substantive rule 14
C. *Crawford* did not establish a watershed procedural rule 15
1. Application of *Roberts* rather than *Crawford* does not seriously diminish accuracy 16
2. *Crawford* did not announce a bedrock rule essential to a fair trial 21
Conclusion 28

TABLE OF AUTHORITIES

Cases:

Arizona v. *Roberson*, 486 U.S. 675 (1988) 18
Barber v. *Paige*, 390 U.S. 719 (1968) 28
Beard v. *Banks*, 542 U.S. 406 (2004) 12, 13, 14, 15, 23
Berger v. *California*, 393 U.S. 314 (1969) 28
Bintz v. *Bertrand*, 403 F.3d 859 (7th Cir.), cert. denied, 126 S. Ct. 174 (2005) 12
Brown v. *Uphoff*, 381 F.3d 1219 (10th Cir. 2004), cert. denied, 543 U.S. 1079 (2005) 12
Bruton v. *United States*, 391 U.S. 123 (1968) 28

Cases—Continued: Page

Butler v. *McKellar*, 484 U.S. 407 (1990) 18
Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 22
California v. *Green*, 399 U.S. 149 (1970) 26
Caspari v. *Bohlen*, 510 U.S. 383 (1994) 18
Colorado v. *Connelly*, 479 U.S. 157 (1986) 25
Crawford v. *Washington*, 541 U.S. 36 (2004) ..... *passim*
Davis v. *Washington*, 126 S. Ct. 2266 (2006) 13, 17, 27
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) ... 24, 25, 27
Dorchy v. *Jones*, 398 F.3d 783 (6th Cir. 2005) 12
Espy v. *Massac*, 443 F.3d 1362 (11th Cir. 2006) 12
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 7, 9, 21
Graham v. *Collins*, 506 U.S. 461 (1993) 12
Idaho v. *Wright*, 497 U.S. 805 (1990) 3, 11, 16, 24
Lave v. *Dretke*, 444 F.3d 333 (5th Cir.), petition for cert. pending, No. 05-11552 (filed June 13, 2006) 12
Manson v. *Brathwaite*, 432 U.S. 98 (1977) 25
Maryland v. *Craig*, 497 U.S. 836 (1990) 26
Mattox v. *United States*, 156 U.S. 237 (1895) 26
Mills v. *Maryland*, 486 U.S. 367 (1988) 23
Mungo v. *Duncan*, 393 F.3d 327 (2d Cir. 2004), cert. denied, 544 U.S. 1002 (2005) 12, 17
Murillo v. *Frank*, 402 F.3d 786 (7th Cir. 2005) ... 12, 14, 17
O'Dell v. *Netherland*, 521 U.S. 151 (1997) 22
Ohio v. *Roberts*, 448 U.S. 56 (1980) ..... *passim*
Pointer v. *Texas*, 380 U.S. 400 (1965) 27

Cases—Continued: Page

Reynolds v. *United States*, 98 U.S. 145 (1879) 26
Roberts v. *Russell*, 392 U.S. 293 (1968) 28
Saffle v. *Parks*, 494 U.S. 484 (1990) 11, 18
Sawyer v. *Smith*, 497 U.S. 227 (1990) 5, 22, 24
Schriro v. *Summerlin*, 542 U.S. 348 (2004) 11, 15, 18, 20, 21
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 14
Simmons v. *South Carolina*, 512 U.S. 154 (1994) 22
Teague v. *Lane*, 489 U.S. 288 (1989) 5, 7, 11
Tennessee v. *Street*, 471 U.S. 409 (1985) 26
Tyler v. *Cain*, 533 U.S. 656 (2001) 12, 14, 16, 17, 21
United States v. *Cronic*, 466 U.S. 648 (1984) 23
United States v. *Inadi*, 475 U.S. 387 (1986) 11
White v. *Illinois*, 502 U.S. 346 (1992) 11, 13

Constitution and statutes:

U.S. Const. :
Amend. V (Double Jeopardy Clause) 18
Amend. VI (Confrontation Clause) ..... *passim*
Amend. VIII 22
Amend. XIV (Due Process Clause) 22, 25
28 U.S.C. 2254(d)(1) 4, 6
Nev. Rev. Stat. (2005):
§ 51.385(1) 3
§ 51.385(1)(a) 3

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INTEREST OF THE UNITED STATES

This case presents the question whether the rule in *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), that the testimonial hearsay statements of an unavailable declarant are inadmissible absent a prior opportunity for cross-examination applies retroactively to cases on collateral review. The United States has a substantial interest in the resolution of that question. The rule adopted by the Court in *Crawford* applies to federal as well as state criminal trials. Whether *Crawford* applies retroactively will therefore have a significant impact on collateral challenges to federal convictions.

STATEMENT

1. In 1987, respondent lived in a motel in Las Vegas, Nevada, with his wife, Laura, their child, Honesty, and his wife's six-year-old daughter, Autumn. Pet. App. 18a, 104a-105a. On Saturday evening, January 16, 1987, Autumn woke up frightened and crying. *Id.* at 18a, 105a. She was initially reluctant to tell her mother what was wrong because she was afraid that respondent would "beat her butt" and that "mom would make dad leave." *Id.* at 105a. After receiving reassurance, Autumn told her mother that respondent had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," and that "he put his chin on her pee-pee." *Id.* at 105a n.1.

On the following Tuesday, January 19, 1987, Laura took Autumn to the hospital, where a doctor examined her. Pet. App. 18a, 105a. The doctor found a tear in Autumn's rectal sphincter and a wide opening in her hymenal ring. *Ibid.* Detective Zinovitch attempted to question Autumn at the hospital, but she was distraught and responded only that someone had hurt her. *Ibid.*

Two days later, Detective Zinovitch interviewed Autumn at his office in a room designed to put her at ease. Pet. App. 19a, 105a-106a. Autumn gave the same description of respondent's conduct that she had given to her mother. *Ibid.* Autumn also demonstrated with anatomically correct dolls what respondent had done to her. *Id.* at 106a. Respondent was arrested and charged with four counts of sexual assault on his stepdaughter. *Ibid.*

At respondent's preliminary hearing, Autumn testified that she could not remember what respondent had done to her or what she had told her mother or the de-

tective. Pet. App. 19a, 106a-107a. The judge declared Autumn an unavailable witness, and the preliminary hearing proceeded with the testimony of Laura and Detective Zinovitch. *Id.* at 19a, 107a.

At trial, the judge held a hearing outside the jury's presence to determine whether Autumn would be able to testify. Pet. App. 107a. When asked to take the oath, Autumn did not respond. *Ibid.* Efforts to persuade Autumn to cooperate were unsuccessful, and the judge declared her unavailable to testify at trial. *Ibid.*

The prosecutor sought to introduce Autumn's statements to her mother and Detective Zinovitch pursuant to Nev. Rev. Stat. § 51.385(1)(a) (2005). Pet. App. 107a. That statute allows the admission of a child's out-of-court statements describing sexual abuse when the circumstances afford sufficient guarantees of trustworthiness and the child is unable to testify or is unavailable. Nev. Rev. Stat. § 51.385(1)(a) (2005). Following a hearing, the court admitted the statements. Pet. App. 107a. The court also admitted into evidence Autumn's testimony at the preliminary hearing. *Ibid.*

2. Respondent was convicted of sexual abuse of a minor and was sentenced to life imprisonment. Pet. App. 19a. The Nevada Supreme Court dismissed respondent's appeal, rejecting his claim that admission of his step-daughter's statements pursuant to Nev. Rev. Stat. § 51.385(1) (2005) violated the Confrontation Clause. Pet. App. 120a-123a. This Court vacated and remanded for further consideration in light of *Idaho* v. *Wright*, 497 U.S. 805 (1990). Pet. App. 119a.

On remand, the Nevada Supreme Court affirmed Bockting's conviction. Pet. App. 103a-118a. Applying *Wright*, the court held that there were sufficient particularized guarantees of trustworthiness to permit the in-

troduction of Autumn's statements to her mother and Detective Zinovitch. *Id.* at 112a-118a. The court concluded that the following circumstances together showed that Autumn's statements were trustworthy: "(1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowle dge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; (5) the child's display of affection for [respondent] as he was preparing to leave was indicative of love rather than hate." *Id.* at 115a-116a.

Respondent petitioned the state trial court for post-conviction relief. Pet. App. 83a. The court denied the petition, and the Nevada Supreme Court dismissed the appeal. *Ibid.*

3. Respondent then filed a petition for a writ of habeas corpus in federal district court. Pet. App. 79a. In an amended complaint, he asserted, *inter alia*, that the admission of his stepdaughter's out-of-court statements violated the Confrontation Clause. *Id.* at 80a. The district court denied relief, holding that the Nevada Supreme Court's decision was neither "contrary to," nor "involved an unreasonable application of, clearly established federal law" and that habeas relief was therefore unavailable under 28 U.S.C. 2254(d)(1). Pet. App. 83a-89a (quoting 28 U.S.C. 2254(d)(1)).

While Bockting's appeal of that decision was pending before the Ninth Circuit, this Court held in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the Confrontation

Clause of the Sixth Amendment generally bars the admission into evidence of testimonial out-of-court statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. The court of appeals requested supplemental briefing on whether *Crawford* applied retroactively to respondent's collateral challenge. Pet. App. 77a-78a.

4. A divided panel of the court of appeals reversed. Pet. App. 15a-76a. A majority of the court (Judge McKeown joined by Judge Wallace) first held that *Crawford* was a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989), because it departed from the test of admissibility set forth in *Ohio* v. *Roberts*, 448 U.S. 56 (1980). The court explained that, while *Roberts* allowed admission of all hearsay statements as long as the statements fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness, *Crawford* held that testimonial hearsay statements are inadmissible unless there has been a prior opportunity for cross-examination. Pet. App. 21a-24a.

A majority of the court (Judge McKeown, joined by Judge Noonan) then held that *Crawford*'s requirement of cross-examination as a precondition for admissibility of testimonial hearsay is applicable to cases on collateral review because it is a bedrock rule of criminal procedure and therefore falls within the second exception to *Teague*'s bar on retroactivity. Pet. App. 24a-34a. The court concluded that the rule in *Crawford* is one "without which the accuracy of convictions would be seriously undermined." *Id.* at 30a. The court further concluded that *Crawford*'s cross-examination rule cannot be dismissed as "incremental," but instead is "an absolute prerequisite to fundamental fairness." *Ibid.* (quoting *Sawyer* v. *Smith*, 497 U.S. 227, 244 (1990)).

A majority of the court (Judge McKeown, joined by Judge Noonan) also held that 28 U.S.C. 2254(d)(1) did not preclude habeas relief because the Nevada Supreme Court's decision upholding the admissibility of Autumn's hearsay statements to the detective was "contrary to * * * clearly established Federal law." Pet. App. 35a (quoting 28 U.S.C. 2254(d)(1)). Interpreting Section 2254(d)(1) to incorporate the *Teague* exceptions, the court reasoned that the Nevada Supreme Court had reached a decision "'contrary to' established Supreme Court precedent in *Crawford*, as made retroactive under *Teague*." *Id.* at 36a. Finally, the court held that admission of Autumn's statements to the detective was not harmless error. *Id.* at 36a-37a.

In a concurring opinion, Judge Noonan expressed the view that *Crawford* did not establish a new rule. Pet. App. 37a-41a. Judge Noonan reasoned that prior Supreme Court decisions, including *Roberts*, had admitted testimonial statements only when there was a prior opportunity for cross-examination. *Id.* at 40a. While acknowledging that *Crawford* departed from the rationale of *Roberts*, Judge Noonan concluded that "correction of a misinterpretation does not create a new rule," and that a "change in rationale" is not "a change in rules." *Ibid.*

Judge Wallace concurred in part and dissented in part. Pet. App. 41a-76a. He agreed with Judge McKeown that *Crawford* established a new rule, but he dissented from the panel's holding that *Crawford* falls within the second *Teague* exception. *Id.* at 41a-53a. Judge Wallace explained that "[t]here is simply no solid evidence that *Roberts* has so seriously undermined the accuracy of criminal proceedings as to discredit the host of final convictions generated pursuant to its authority." *Id.* at 48a. Judge Wallace further explained that the

focus of the Court's decision in *Crawford* was on "fidelity to the Framers' intentions, rather than the accuracy of convictions obtained under the *Roberts* regime." *Id.* at 51a. Because Judge Wallace concluded that *Crawford* is not retroactive under *Teague*, he did not reach the question whether "AEDPA 'nullifies' the *Teague* exceptions, such that no 'new rule'—even one fitting within one of those exceptions—may serve as the basis for habeas relief." *Id.* at 53a (citation omitted).

With nine judges dissenting, the Ninth Circuit denied rehearing en banc. Pet. App. 1a-12a. In an opinion joined by all of the dissenting judges, Judge O'Scannlain reasoned that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), is the only new rule that this Court has viewed as satisfying the second *Teague* exception, and that *Crawford* does not approach *Gideon* in the magnitude of its effect on the accuracy of criminal proceedings. Pet. App. 3a.

SUMMARY OF ARGUMENT

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules do not apply retroactively unless they are substantive rules or watershed rules of criminal procedure. Because *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), announced a new rule that is neither substantive nor a watershed rule of criminal procedure, it does not apply retroactively on collateral review.

A. A decision that overrules a prior decision necessarily creates a new rule, and *Crawford* falls in that category. In holding that a prior opportunity for cross-examination is an indispensable requirement for admission of testimonial hearsay of an unavailable declarant and that a finding of reliability is insufficient, *Crawford*

overruled *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and established a new rule.

B. *Crawford*'s new rule is not substantive and therefore does not fall within the first *Teague* exception. The rule that testimonial hearsay may not be admitted absent a prior opportunity for cross-examination is manifestly procedural. It has nothing to do with the range of conduct or the class of persons that the law punishes. Instead, it affects only the manner of determining whether a defendant has violated the law. That rule is therefore procedural.

C. *Crawford*'s new rule also does not fit within *Teague*'s second exception for watershed rules of criminal procedure. That exception applies only when (1) infringement of the new rule seriously diminishes the accuracy of convictions, and (2) the rule alters our understanding of the bedrock procedural elements essential to a fair trial. *Crawford*'s new rule satisfies neither requirement.

1. Because the old rule of *Roberts* incorporated a reliability requirement—allowing testimonial hearsay to be introduced only when it was so trustworthy that cross-examination would not significantly add to reliability—the admission of evidence allowed by *Roberts* but excluded by *Crawford* could not have seriously diminished the accuracy of convictions. Indeed, *Roberts*, whatever its deficiencies, also enhanced accuracy relative to the more textually-grounded *Crawford* rule in two respects. When a declarant who has made a highly reliable out-of-court statement is unavailable to testify, the effect of *Crawford*'s exclusionary rule is the loss of highly reliable evidence that would have been admissible under *Roberts*. And because *Roberts* requires adequate indicia of reliability for both testimonial and non-testi-

monial hearsay, the *Roberts* rule furnishes a greater guarantee of reliability with respect to non-testimonial hearsay. *Roberts*' accuracy-enhancing features reinforce the conclusion that its application does not seriously diminish accuracy.

The reasoning in *Crawford* is fully consistent with that conclusion. *Crawford* did not overrule *Roberts* based on a determination that *Roberts* had seriously diminished accuracy, but because it deviated from the Framers' understanding of the meaning of the Confrontation Clause.

2. *Crawford* also did not alter our understanding of bedrock elements of criminal procedure that are essential to a fair trial. It has nowhere near the fundamental and sweeping importance of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the only rule that this Court has identified as falling within *Teague*'s second exception. The right-to-counsel established in *Gideon* pervasively affects the fairness of every aspect of the trial, while *Crawford* affects the admissibility of one narrow category of evidence—testimonial hearsay. Indeed, because *Roberts* had already excluded testimonial hearsay unless it was sufficiently trustworthy, *Crawford* only incrementally affected the admissibility of that category of evidence. In light of its limited scope and incremental effect, *Crawford* cannot be viewed as indispensable to a fair trial.

That is particularly true because a series of complementary procedural protections helped to ensure that trials under *Roberts* were fundamentally fair. Among other things, a defendant could cross-examine the witness to the testimonial statement, introduce evidence that would call into question the veracity of the declarant or the reliability of his statement, and count

on the common sense of the jury to evaluate the reliability of the statement in light of all the evidence.

Crawford's relationship with the large body of Confrontation Clause law that preceded it confirms its non-bedrock status. It had no effect on numerous Confrontation Clause principles, including those governing cross-examination of live witnesses and face-to-face confrontation. And while it overruled *Roberts*, it is consistent with the results of every prior decision except one. Because *Crawford* is one of several rules that implement the right to confrontation, and its incremental protection is not indispensable to a fair trial, it is not the kind of bedrock rule that falls within *Teague*'s second exception.

ARGUMENT

CRAWFORD DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), the Court held that testimonial hearsay from an unavailable declarant is generally inadmissible under the Confrontation Clause unless the defendant had a prior opportunity for cross-examination. The question presented in this case is whether *Crawford*'s requirement of a prior opportunity for cross-examination of the declarant of a testimonial statement applies retroactively to cases on collateral review.[1]

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[1] The only testimonial hearsay at issue here is Autumn's statement to Detective Zinovitch. The Nevada Supreme Court determined that Autumn was unavailable. Pet. App. 108a n.4. The question whether *Crawford*'s unavailability requirement applies retroactively is thus not at issue here. In any event, it is unclear whether the law in effect at the time respondent's conviction became final would have required unavailability as a precondition for admission of Autumn's statement to the detective. See *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980) ("In the usual

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules are generally inapplicable to cases that have already become final. That general bar on retroactivity reflects a recognition that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. The general rule against retroactive application of new rules is subject to two limited exceptions. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004). Second, new procedural rules apply retroactively only when they constitute "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) (internal quotation marks and citation omitted). The latter category "is extremely narrow," *Summerlin*, 542 U.S. at 352, and "it is unlikely that any of these wa-

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case * * * , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."); *United States* v. *Inadi*, 475 U.S. 387 (1986) (unavailability is not a requirement for the admission of statements made in furtherance of a conspiracy); *Idaho* v. *Wright*, 497 U.S. 805, 816 (1990) (assuming without deciding that unavailability was a precondition to admissibility of a victim's statements to a doctor that were not made in furtherance of medical treatment); *White* v. *Illinois*, 502 U.S. 346 (1992) (unavailability requirement does not apply to excited utterances or statements made for purpose of medical diagnosis). Judge Wallace, the only judge who examined respondent's Confrontation Clause claim under *Roberts*, concluded that *Roberts* required a finding of unavailability. Pet. App. 57a. He further concluded that the Nevada Supreme Court's finding of unavailability was not unreasonable and that respondent therefore was not entitled to federal habeas relief. *Id.* at 58a-62a.

tershed rules ha[s] yet to emerge." *Tyler* v. *Cain*, 533 U.S. 656, 667 n.7 (2001) (internal quotation marks and citation omitted). Because *Crawford*'s cross-examination holding is a new rule, and that rule is neither a substantive rule nor a watershed rule of criminal procedure, it does not apply retroactively on collateral review.[2]

A. *Crawford* Announced A New Rule

A rule is "new" for *Teague* purposes unless it was "*dictated*" by the precedent in effect when the defendant's conviction became final. *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted). While that inquiry can be difficult in some cases, no such difficulty arises when a decision overrules a prior decision. Whatever weaknesses may be apparent in a precedent of this Court, such a precedent can scarcely *dictate* its own overruling. Any decision that overrules a prior decision necessarily creates a new rule. *Graham* v. *Collins*, 506 U.S. 461, 467 (1993). *Crawford* is such a decision.

When respondent's conviction became final, *Ohio* v. *Roberts*, 448 U.S. 56 (1980), allowed admission of any out-of-court statement of an unavailable declarant when the statement had "adequate indicia of reliability." *Id.* at 66 (internal quotation marks and citation omitted). Statements had adequate indicia of reliability when they

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[2] Other than the court below, every court of appeals that has considered the question has reached that conclusion. *Mungo* v. *Duncan*, 393 F.3d 327, 332-336 (2d Cir. 2004), cert. denied, 544 U.S. 1002 (2005); *Lave* v. *Dretke*, 444 F.3d 333, 334-336 (5th Cir.), petition for cert. pending, No. 05-11552 (filed June 13, 2006); *Dorchy* v. *Jones*, 398 F.3d 783, (6th Cir. 2005); *Bintz* v. *Bertrand*, 403 F.3d 859, 865-867 (7th Cir.), cert. denied, 126 S. Ct. 174 (2005); *Murillo* v. *Frank*, 402 F.3d 786, 788-791 (7th Cir. 2005); *Brown* v. *Uphoff*, 381 F.3d 1219, 1225-1227 (10th Cir. 2004), cert. denied, 543 U.S. 1079 (2005); *Espy* v. *Massac*, 443 F.3d 1362, 1366-1367 (11th Cir. 2006).

fell within a "firmly rooted hearsay exception" or when they bore "particularized guarantees of trustworthiness." *Ibid.* *Crawford* held that, with respect to testimonial out-of-court statements, a finding of reliability is insufficient to satisfy the Confrontation Clause. As to that class of hearsay statements, the Court held, the Confrontation Clause bars admission unless there has been a prior opportunity for cross-examination. 541 U.S. at 68. In holding that a prior opportunity for cross-examination is an indispensable requirement for admission of testimonial hearsay and that a finding of reliability is insufficient, *Crawford* overruled *Roberts* and established a new rule. See *Davis* v. *Washington*, 126 S. Ct. 2266, 2275 n.4 (2006) ("We overruled *Roberts* in *Crawford* by restoring the * * * cross-examination requirement[].").

Crawford cannot be excised from the category of new rules on the theory that no prior Supreme Court decision had upheld admission of testimonial statements absent a prior opportunity for cross-examination. See Pet. App. 39a-40a (Noonan, J.). In *White* v. *Illinois*, 502 U.S. 346, 349-351 (1992), the Court upheld admission of a child's statements to a police officer about a past incident even though there was no prior opportunity for cross-examination. The Court in *Crawford* expressly acknowledged that *White* was "arguably in tension with the rule requiring a prior opportunity for cross-examination." 541 U.S. at 58 n.8.

More fundamentally, in deciding whether a decision establishes a new rule under *Teague*, the question is not whether it can be *harmonized* with the results of prior precedents, but whether it is *compelled* by the constitutional interpretation that produced those results. *Banks*, 542 U.S. at 411. The precedential effect of the

Court's decisions is determined not only by their specific results, but also by the "rationale upon which the Court based the results." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 66-67 (1996); accord *Tyler*, 533 U.S. at 663 n.4. Whether or not any prior case upheld admission of testimonial hearsay not subject to cross-examination, the constitutional interpretation in effect when respondent's conviction became final allowed admission of such statements when they had adequate indicia of reliability. Because *Crawford* overruled that interpretation of the Constitution, it established a new rule.

For similar reasons, that *Crawford* corrected a misinterpretation of the Constitution does not prevent the decision from having created a new rule. Pet. App. 40a (Noonan, J.). The benchmark for measuring whether a rule is "new" is not the original meaning of the Constitution, but the interpretation of the Constitution in effect when the defendant's conviction became final. *Banks*, 542 U.S. at 411. Thus, while *Crawford*'s overruling of *Roberts* may have restored the original meaning of the Confrontation Clause, it nonetheless created a new rule. See *Murillo* v. *Frank*, 402 F.3d 786, 790 (7th Cir. 2005) ("*Crawford* was not 'dictated' by *Roberts* * * * ; it broke from [it]. That the break takes the form of a return to an older, less flexible but historically better grounded approach does not make it less a break.").

B. *Crawford* Established A Procedural Rather Than A Substantive Rule

Because *Crawford* established a new rule, it does not apply retroactively unless it falls within one of the two *Teague* exceptions to the bar on retroactive application of new rules. *Crawford* does not fall within the first exception for new substantive rules because *Crawford*'s

holding that testimonial hearsay is inadmissible absent a prior opportunity for cross-examination is a procedural rather than a substantive rule.[3]

For *Teague* purposes, a rule is substantive when "it alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. In contrast, a rule is procedural when it regulates "the *manner of determining* the defendant's culpability." *Ibid.* Under that standard, the holding in *Crawford* is clearly procedural rather than substantive. The rule that testimonial hearsay may not be admitted absent a prior opportunity for cross-examination has nothing to do with the range of conduct or the class of persons that the law punishes. Instead, whether viewed as a rule governing the admissibility of evidence, or a rule that entitles a defendant to cross-examine a declarant who makes a testimonial statement, it affects only the manner of determining whether a defendant has violated the law. Thus, as *Crawford* itself made clear, its rule that testimonial hearsay is inadmissible absent a prior opportunity for cross-examination is "a procedural rather than a substantive guarantee." 541 U.S. at 61.

C. *Crawford* Did Not Establish A Watershed Procedural Rule

The court of appeals recognized that *Crawford* established a new rule and that the rule is procedural rather than substantive. Pet. App. 24a. It concluded, however, that the rule fit within *Teague*'s second exception for

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[3] While the Court has on occasion referred to rules that place conduct or persons beyond the State's power to punish as exceptions to *Teague*'s bar on retroactivity, "they are more accurately characterized as substantive rules not subject to the bar." *Summerlin*, 542 U.S. at 352 n.4; *Banks*, 542 U.S. at 417 n.7.

watershed rules of criminal procedure. *Id.* at 24a-25a. That conclusion is incorrect. A rule has watershed status only if it satisfies two requirements: (1) "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and (2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks, citations, and emphasis omitted). The *Crawford* rule does not satisfy either requirement.

1. Application Of Roberts *Rather Than* Crawford *Does Not Seriously Diminish Accuracy*

a. Applying the *Roberts* rule rather than the *Crawford* rule does not seriously diminish the likelihood of an accurate conviction because *Roberts* incorporated a requirement of reliability. *Roberts* did not freely permit the admission of all out-of-court statements not subject to prior cross-examination. Rather, *Roberts* authorized the admission of such statements only when they bore "adequate indicia of reliability." 448 U.S. at 66 (internal quotation marks and citation omitted). That standard was a stringent one. "Reflecting [the Confrontation Clause's] underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence," *Roberts* "countenance[d] only hearsay marked with such trustworthiness that there [was] no material departure from the reason of the general rule." *Id.* at 65 (internal quotation marks and citation omitted). That meant that an out-of-court statement could be admitted under *Roberts* only if it were "so trustworthy that adversarial testing would add little to its reliability." *Wright*, 497 U.S. at 821. Because *Roberts* allowed testimonial hearsay only when

cross-examination would not have added significant value, proper application of *Roberts*, by definition, could not have "seriously diminish[ed] the likelihood of obtaining an accurate conviction." *Tyler*, 533 U.S. at 665 (citation omitted).

b. In certain respects, the *Roberts* rule, with its focus on reliability, rather than confrontation for its own sake, promotes more accurate decisions than *Crawford*. For example, in some cases, *Crawford* "precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under [*Roberts*]." *Mungo* v. *Duncan*, 393 F.3d 327, 335 (2d Cir. 2004), cert. denied, 544 U.S. 1002 (2005). When the out-of-court declarant is available to testify, the *Crawford* rule may cause the government to call the declarant to the stand, thereby promoting accuracy. But when a declarant who has made a highly reliable out-of-court statement is unavailable to testify because of "death or incapacity or threats or loyalty to one's confederates," the effect of *Crawford*'s exclusionary rule is the loss of highly reliable evidence. *Murillo*, 402 F.3d at 790. In such cases, *Crawford* "will diminish, rather than increase, the accuracy of the process." *Mungo*, 393 F.3d at 336.

In addition, *Crawford* applies only to testimonial out-of-court statements. *Roberts*, in contrast, required adequate indicia of reliability for both testimonial and non-testimonial hearsay. Accordingly, at least with respect to non-testimonial hearsay, the *Roberts* rule furnishes a greater guarantee of reliability than *Crawford*. See *Davis*, 126 S. Ct. at 2274 (holding that the Confrontation Clause is limited to testimonial statements, an interpretation that "was suggested in *Crawford*, even if not explicitly held").

When a proposed new constitutional rule would diminish accuracy, it clearly is not retroactive. See *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994) (proposed rule applying Double Jeopardy Clause to bar second non-capital sentencing proceeding to determine persistent offender status not within second exception because a second proceeding would enhance accuracy); *Saffle*, 494 U.S. at 495 (proposed rule precluding an anti-sympathy instruction on the ground that it interferes with consideration of mitigating evidence does not fall within second exception because accuracy is more likely to be threatened than promoted by consideration whether the defendant can strike an emotional chord in a juror); *Butler* v. *McKellar*, 494 U.S. 407, 416 (1990) (restrictions on police interrogation added by *Arizona* v. *Roberson*, 486 U.S. 675 (1988), do not fall within second exception because violation of the restrictions may increase the likelihood of obtaining an accurate decision). Whether or not the accuracy-enhancing features of *Roberts* mean that the *Roberts* regime promotes more accurate decisions than *Crawford*, those features, at a minimum, reinforce the conclusion that application of *Roberts* rather than *Crawford* does not *seriously diminish* accuracy. See *Summerlin*, 542 U.S. at 356 (that judicial factfinding is more accurate than jury factfinding in certain respects helps to show that judicial factfinding does not seriously diminish accuracy).

c. The court of appeals concluded that *Crawford* itself makes clear that, as applied to testimonial hearsay, replacement of cross-examination with a judicial determination of reliability seriously diminishes accuracy. Pet. App. 29a-30a. But *Crawford* did not overrule *Roberts* based on a determination that *Roberts* had seriously diminished the accuracy of verdicts. Rather, it over-

ruled *Roberts* because it was inconsistent with the Framers' understanding that the Confrontation Clause would bar the admission of testimonial hearsay absent a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54 ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless * * * the defendant had a prior opportunity for cross-examination."); *id.* at 55-56 ("[T]he historical sources * * * suggest that [the] requirement [of cross-examination] was dispositive, and not merely one of several ways to establish reliability."); *id.* at 60 (the rationale of *Roberts* is not "faithful to the original meaning of the Confrontation Clause"); *id.* at 68 ("Where testimonial hearsay is at issue * * * the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). Indeed, *Crawford* faulted the *Roberts* decision for placing too much emphasis on the overall goals of accuracy and reliability, rather than focusing on the textual guarantee of confrontation. The Court specifically explained that *Roberts*' mistake was that it had formulated a rule to serve the Confrontation Clause's "ultimate goal * * * to ensure reliability of evidence," when the Clause, as conceived by the Framers, "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61.

As the court of appeals noted (Pet. App. 29a-30a), the Court in *Crawford* criticized the *Roberts* test as "unpredictable." 541 U.S. at 63. But the Court did not assert that *Roberts*' unpredictability had resulted in a serious diminution in accuracy. Rather, the Court viewed *Roberts*' unpredictability as having resulted in the admission of testimonial statements that the Framers would

have regarded as "core confrontation violations." *Ibid.* "[N]othing in the *Crawford* opinion suggests that trial and appellate judges were likely to admit clearly unreliable evidence in anything but the exceptional case." Pet. App. 7a (O'Scannlain, J., dissenting from the denial of rehearing en banc).

The Court in *Crawford* also stated that the Confrontation Clause reflects the Framers' judgment that reliability "can best be determined" through cross-examination. 541 U.S. at 61. But the relevant question is not whether the Framers believed that a rule barring admission of out-of-court testimonial statements absent a prior opportunity for cross-examination would lead to greater accuracy than a rule barring admission of all hearsay statements that do not satisfy a stringent standard of reliability. *Summerlin*, 542 U.S. at 355. Nor is the question whether the former rule actually does lead to greater accuracy. *Ibid.* Rather, the question is whether application of the *Roberts* reliability rule rather than the *Crawford* cross-examination rule "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Id.* at 355-356 (internal quotation marks and citation omitted). And, for the reasons discussed above, *Roberts* does not have that effect. There is therefore no basis "to discredit the host of final convictions generated pursuant to its authority." Pet. App. 48a (Wallace, J., dissenting).

d. In reaching a contrary conclusion, the court of appeals relied on this Court's decision in *Summerlin*. Pet. App. 25a. That reliance is unfounded. In *Summerlin*, the Court held that a violation of *Ring*'s requirement that a jury rather than judge determine aggravating circumstances necessary for imposition of the death

penalty *did not* seriously diminish accuracy. The Court reasoned that even though the Framers may have believed that juries produce more accurate decisions, and even if they actually do, that does not establish that judicial factfinding seriously diminishes accuracy. *Summerlin*, 542 U.S. at 355-356. Nothing in that reasoning suggests that application of *Roberts* rather than *Crawford* seriously diminishes accuracy. If anything, *Summerlin* underscores that the adoption of a new rule that implements a procedure that the Framers viewed as promoting reliability does not automatically mean that the new rule enhances reliability to the degree required for retroactivity.

2. Crawford *Did Not Announce A Bedrock Rule Essential To A Fair Trial*

There is an additional reason that *Crawford*'s cross-examination rule does not fall within the second *Teague* exception. *Crawford* does not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks, citation, and emphasis omitted).

a. The Court has identified only one rule that has had that kind of groundbreaking effect: *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Banks*, 542 U.S. at 417. Before *Gideon*, it was thought that an indigent defendant charged with a felony offense could in some cases receive a fair trial without the opportunity for assistance of appointed counsel. In *Gideon*, the Court repudiated that notion when it recognized that, absent a waiver of counsel, a felony trial conducted without a defense lawyer was an inherently unfair vehicle for adjudicating the defendant's guilt or innocence. In that way, *Gideon* altered the understanding of the procedures that

are indispensable to a fair trial; it added the right to appointed counsel to that core set of rules.

The Court has "not hesitated to hold that less sweeping and fundamental rules do not fall within *Teague*'s second exception." *Banks*, 542 U.S. at 418. For example, in *Sawyer*, the Court held that the rule in *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), that the Eighth Amendment bars imposition of a capital sentence when a prosecutor mistakenly informs the jury that responsibility for the death penalty rests elsewhere did not fall within *Teague*'s second exception. *Caldwell* had reasoned that there was an unacceptable risk that a misleading remark about the jury's responsibility could affect the reliability of the sentencing decision. But because a defendant could already obtain relief under a pre-*Caldwell* decision by showing that a prosecutorial remark caused actual prejudice, the Court concluded that *Caldwell*'s "systemic rule enhancing reliability" was not an "absolute prerequisite to fundamental fairness." *Sawyer* v. *Smith*, 497 U.S. 227, 244 (1990) (citation omitted).

Similarly, in *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), the Court held that the rule in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), that a capital defendant has a right under the Due Process Clause to introduce evidence of his parole ineligibility to rebut a prosecutor's future-dangerousness argument did not fall within *Teague*'s second exception. The Court reasoned that "[u]nlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." 521

U.S. at 167 (internal quotation marks and citation omitted).

And in *Banks*, the Court refused to make retroactive the rule in *Mills* v. *Maryland*, 486 U.S. 367 (1988), that the Eighth Amendment prohibits capital sentencing schemes that require juries to find mitigating factors unanimously. The Court reasoned that the *Mills* rule, while designed to avoid arbitrary impositions of the death sentence, "applies fairly narrowly" and "has none of the primacy and centrality of the rule adopted in Gideon." *Banks*, 542 U.S. at 420 (citation omitted).

The lesson of *Sawyer* and *O'Dell* and *Banks* is that rules that implement bedrock constitutional guarantees are not themselves bedrock unless they approach the fundamental and sweeping importance of *Gideon*. When implementing rules produce "incremental change" and lack the "primacy and centrality" of *Gideon*, they do not fall within *Teague*'s second exception. *Banks*, 542 U.S. at 419-420 (citation omitted).

b. *Crawford*'s cross-examination rule for testimonial hearsay does not approach the fundamental and sweeping importance of *Gideon*. The presence of counsel pervasively affects all aspects of the trial, including trial strategy, the presentation of evidence, cross-examination of witnesses, the presentation of argument on legal issues that arise during the trial, and argument to the jury. A lay defendant is ill-equipped to perform those crucial tasks without the assistance of counsel, particularly when the power of the government is marshaled against him. Accordingly, when an indigent defendant facing serious criminal charges is completely denied counsel's assistance in performing those tasks, a fair trial is not possible. *United States* v. *Cronic*, 466 U.S. 648, 659 (1984).

In contrast, the *Crawford* rule is not "so fundamental and pervasive." See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). It affects only the admissibility of one limited category of evidence—testimonial hearsay. Moreover, even in that limited area, the effect of *Crawford* is only incremental. *Roberts* had already barred the admission of testimonial hearsay that had not been subjected to cross-examination unless the hearsay was so trustworthy that cross-examination would add only marginally to reliability. And a determination of trustworthiness had to be based on circumstances surrounding the making of the statement that demonstrated the statement's intrinsic trustworthiness, not on other evidence that corroborated the statement's truth. *Idaho* v. *Wright*, 497 U.S. 805, 822 (1990). In light of that substantial protection, it cannot be said that the *Crawford* rule is an "absolute prerequisite to fundamental fairness." *Sawyer*, 497 U.S. at 244 (citation omitted).

That is especially true because other procedural protections complemented the *Roberts* rule and helped to ensure that proceedings governed by *Roberts* were fundamentally fair. In trials conducted under *Roberts*, the defendant could seek to discredit an out-of-court statement admitted under *Roberts* through cross-examination of the witness who testified about that statement. The defendant could also introduce evidence of his own to challenge the veracity of the out-of-court declarant or the reliability of his statement. If the out-of-court declarant were available, the defendant could exercise his right of compulsory process to call the declarant to the stand and subject him to cross-examination. Through closing argument, the defendant's attorney could draw the jury's attention to any circumstances that might call into question the reliability of the state-

ment. And the jury could exercise its common sense to evaluate the reliability of the statement in light of all the other evidence in the case. When coupled with those complementary procedural protections, there can be no viable claim that the *Roberts* reliability test automatically results in a trial that is fundamentally unfair.

Indeed, it is particularly difficult to argue that admission of testimonial statements pursuant to the *Roberts* reliability test necessarily results in an unfair trial when this Court has held that the admission of testimony that is of doubtful reliability ordinarily does not offend Due Process. For example, in *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977), the Court held that the introduction of identification evidence of questionable reliability does not violate Due Process because "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Similarly, in *Colorado* v. *Connelly*, 479 U.S. 157, 167-168 (1986), the Court held that a confession of someone who had experienced hallucinations might be "quite unreliable," but its admission did not violate Due Process. If the admission of evidence of questionable reliability does not necessarily result in a trial that is fundamentally unfair, neither does the admission of evidence that has been found to bear adequate indicia of reliability.

c. The incremental, non-bedrock nature of *Crawford* is further demonstrated by its relationship to the body of Confrontation Clause law that preceded it. While *Crawford* overruled *Roberts* as applied to testimonial hearsay, it otherwise left undisturbed that large body of law. For example, *Crawford* did not affect the rules that govern the scope of a defendant's right to cross-examine live witnesses. See *Van Arsdall*, 475 U.S. at 679 (Con-

frontation Clause guarantees an opportunity for effective cross-examination, but it permits a court to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, witness safety, repetition, or relevance). It did not affect the rules that govern a defendant's right to confront face-to-face witnesses who appear before the trier of fact. See *Maryland* v. *Craig*, 497 U.S. 836 (1990) (a defendant has a right to face-to-face confrontation except where denial is necessary to further an important public policy and the reliability of the testimony is otherwise assured). And it did not affect the admissibility of non-testimonial out-of-court statements, such as statements made during the course of a conspiracy or statements contained in business records. See *Crawford*, 541 U.S. at 56.

Even as to testimonial statements, *Crawford* did not alter a number of well established Confrontation Clause doctrines. For example, *Crawford* did not disturb the rule that out-of-court statements may be introduced for a purpose other than establishing the truth of the matter asserted, 541 U.S. at 59 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)), the rule that an out-of-court statement not subjected to prior cross-examination may be admitted so long as the declarant appears for cross-examination at trial, *ibid.* (citing *California* v. *Green*, 399 U.S. 149, 162 (1970)), the rule allowing the admission of dying declarations, *id.* at 56 n.6 (citing *Mattox* v. *United States*, 156 U.S. 237, 243-244 (1895)), the rule that a defendant may forfeit the right to confrontation by wrongdoing, *id.* at 62 (citing *Reynolds* v. *United States*, 98 U.S. 145, 158-159 (1879)), or the rule that an error under the Confrontation Clause is subject to

harmless error review. See *Van Arsdall*, 475 U.S. at 684.

Other factors reinforce the conclusion that *Crawford* lacks bedrock status, including that it can be reconciled with the results of all prior decisions of this Court except one, *Crawford*, 541 U.S. at 58 n.8, and that it identified only four narrow categories of testimonial statements: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," and "police interrogations." *Id.* at 68. The Court's subsequent decision in *Davis* has further confined the reach of *Crawford*, holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 126 S. Ct. at 2273. Thus, while *Crawford*'s rule that testimonial hearsay is inadmissible absent a prior opportunity for cross-examination is significant, it is not the kind of bedrock rule that fundamentally alters our understanding of what is essential to the fairness of a proceeding.

d. That conclusion is fully consistent with the Court's statement in *Crawford* that the right to confrontation is "a bedrock procedural guarantee." *Crawford*, 541 U.S. at 42. *Crawford* did not establish the right to confrontation. That guarantee was established by the Framers of the Constitution and was made applicable to the States by *Pointer* v. *Texas*, 380 U.S. 400 (1965). *Crawford* implements that bedrock guarantee. But as discussed above, such implementing rules are not themselves bedrock unless they have the kind of fundamental and sweeping importance of *Gideon*. And *Crawford* does not have that kind of fundamental and sweeping importance. While significant, *Crawford* is still simply

one of several rules that implement the right to confrontation, and its incremental protection is not indispensable to a fair trial. Accordingly, *Crawford* is not the kind of truly bedrock rule that falls within *Teague*'s second exception.[4]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[4] In two cases decided before *Teague*, the Court held retroactive two rules implementing the Confrontation Clause. See *Roberts* v. *Russell*, 392 U.S. 293 (1968) (holding retroactive the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), that the Confrontation Clause bars admission at a joint trial of a defendant's extrajudicial confession implicating a co-defendant); *Berger* v. *California*, 393 U.S. 314 (1969) (holding retroactive the rule in *Barber* v. *Paige*, 390 U.S. 719 (1968), that the Confrontation Clause bars admission of preliminary hearing testimony unless the government has made a good faith effort to secure the witness's presence at trial). Those decisions, however, were based on retroactivity principles that *Teague* condemned as insufficiently responsive to the serious costs to the criminal justice system caused by disturbing the finality of convictions that were obtained in accordance with then-existing law. Those decisions are therefore inapposite here.